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ABSTRACT

In school law, legal decisions frequently revolve around the testimony of a single child. A summary of the evidentiary and procedural concerns that may arise in such cases and an overview of practical advice for interviewing and examining children in a legal proceeding are provided in this article. The text discusses the competency of children to testify, the district courts' broad discretion in determining the competency of a witness, and the mental examinations for the purpose of determining competency, which usually are not allowed. When the accused attacks the credibility of a child witness, the other party may offer a prior consistent statement made by the child so as to restore the child's credibility. Other issues of importance include the admissibility of testimony by health-care providers, testimony related to statements over a startling event made under the stress of the event, statements made soon after the event, rules that create a hearsay exception for certain statements, evidence of a victim's past sexual behavior, and expert testimony in child-abuse cases. Some other issues that arise in child cases include protective procedures, such as videotaping and closed-circuit television; the use of pseudonyms; the right of confrontation in civil cases; investigative interviewing; and courtroom considerations. (RJM)

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In school law, the outcome of many cases frequently hinges on the testimony of a single child who may or may not have the vocabulary, memory, and presence to relate what he saw or experienced in the past. In some of these cases, such as a teacher termination case, the school lawyer presents the child and must explain any inconsistencies in the child's testimony. In cases in which the child has sued the school district, the school lawyer is sometimes in the position of having to discredit the child's testimony. In either situation, the school lawyer must have a command of the rules of evidence and must understand the psychological or developmental factors that may affect the way a child testifies. This article will briefly summarize some of the evidentiary and procedural concerns that may arise in these cases and will provide practical advice for interviewing and examining children in a legal proceeding.

COMPETENCY OF CHILDREN TO TESTIFY

In the federal courts, children as young as three years old have testified. Rule 601 of the Federal Rules of Evidence establishes a general rule that "[e]very person is competent to be a witness...." There is no baseline mental capacity requirement. *See* Fed. R. Evid. 601 advisory committee's notes. Because the district courts have the advantage of direct observation of witnesses, they have broad discretion in determining the competency of a witness, and their decisions will not be reversed in the absence of an abuse of discretion. *United States v. Allen J.*, 127 F.3d 1292 (10th Cir. 1997). Inconsistencies in a child's testimony raise questions of credibility, not competence. *Id.*

Accordingly, mental examinations for the purpose of determining competency usually are not allowed. *See, e.g., State Ex. Rel. Holmes v. Lanford*, 764 S.W.2d 593, 594 (Tex. App.—Houston [14th Dist.] 1989, no writ history) (the state has no authority to force a child "to submit to such an invasion of privacy"); *State v. Gabrielson*, 464 N.W.2d 434 (Iowa 1990) (trial court lacked authority to compel exam); *State v. Robinson*, 835 S.W.2d 303 (Mo. 1992) (same); *but see Allen J.*, 127 F.3d 1292 (competency exam allowed in certain criminal cases).

COMMON EVIDENTIARY ISSUES

Prior Consistent Statements—Fed. R. Evid. 801(d)(1)(B)

When a person accused of wrongdoing attacks the credibility of the child witness by suggesting that the child's allegation is a recent fabrication, the other party may offer a prior *consistent* statement made by the child. The purpose of the prior consistent statement is to restore the child's credibility, not to prove that the wrongdoing occurred. The key case on this rule is *United States v. Tome*, 115 S.Ct. 696 (1995), in which a divorced father was accused of molesting his four-year-old daughter, A.T. She made numerous statements to a variety of doctors, social workers, and babysitters. When she was

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six years old, she testified at trial, as did several of her "outcry" witnesses. The trial court admitted the out-of-court statements over a defense objection that the allegations were fabricated and were motivated by A.T.'s desire to live with her mother. The father was convicted. On appeal, the Tenth Circuit rejected the "pre-motive" rule and held that the timing of the statements went to their weight, not their admissibility. In a 5-4 decision, the Supreme Court reversed, holding that the "pre-motive" rule applied and that, as a precondition to admissibility, a statement being offered under Rule 801(d)(1)(B) must actually refute the charge of recent fabrication; it cannot merely bolster the child's in-court testimony.

Rule 801(d)(1)(B) is illustrated by the following example: Assume that a teacher has been accused of inappropriate sexual touching and that he has been recommended for termination. During cross-examination of the student, the teacher's attorney suggests that a recent bad grade motivated the student to bring forth her allegations. By implying that a poor grade motivated the student to lie, the attorney has opened the door to testimony that the student—before she ever received the bad grade—had told a teacher that improper touching had occurred.

Medical Diagnosis Or Treatment Exception—Fed. R. Evid. 803 (4)

Statements made by a child to a physician, nurse, ambulance driver, or other health care providers may be admissible if they are reasonably pertinent to diagnosis or treatment. For example, after remand in *United States v. Tome*, 61 F.3d 1446 (10th Cir. 1995), the Tenth Circuit held that the girl's statements to her pediatrician (including identification of her father as perpetrator) were admissible, but that statements to her babysitter were inadmissible. This exception applies to statements made to a physician by the child and to statements made by the child's parent or caregiver. *Lorejoy v. U.S.*, 92 F.3d 628, 631-632 (8th Cir. 1996).

Excited Utterance—Fed. R. Evid. 803(2)

This rule applies to statements relating to a startling event made while the declarant was under the stress or excitement caused by the event. This exception is frequently used to obtain admission of a child's out-of-court statements alleging child abuse. *See United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993); *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988); *United States v. Rivera*, 43 F.3d 1291, 1296 (9th Cir. 1995).

Residual Exception—Fed. R. Evid. 803(24)

Courts appear to be relying on the residual exception with greater frequency. In *Tome*, 115 S.Ct. at 705, the Supreme Court appeared to invite its use. For this exception to apply, the trial court must determine that the statement is offered as evidence of a material fact, the statement is more probative that any other evidence that the proponent can procure through reasonable efforts, and the interests of justice will be served by admission of the statement. Courts may look at whether the statement was made close in time to the incident, whether the statement contains age-appropriate terminology, and whether there is evidence of a lack of motive to lie, among other factors. In *United States v. Rouse*, 111 F.3d 561, 570 (8th Cir. 1997), the court permitted a trained investigator to testify about his conversations with three abuse victims. In *United State. v. Farley*, 992 F.2d 1122 (10th Cir. 1993), the court allowed statements made the night of an alleged assault and the next day. In *Tome*, the court declined to allow statements made to a social worker one year after the fact. 61 F.3d at 1454.

For a discussion of factors that courts will consider in assessing the reliability of out-of-court statements by a child witness and for a discussion of when the use of hearsay violates the accused's constitutional rights, see *Idaho v. Wright*, 110 S.Ct. 3139 (1990).

"Outcry" Statutes

Some states have adopted "outcry" statutes or rules that create a hearsay exception for certain statements made by a child during his or her first "outcry" about the abuse. *See, e.g., Swan v. Peterson*, 6 F.3d 1373, 1378 (9th Cir. 1993), *cert. denied*, 513 U.S. 985 (1994) (hearsay statements to day-care worker were admissible under Washington "outcry" statute); TEX. CODE CRIM. PROC. ANN. art. 38.072 (Vernon 1996) (permitting hearsay testimony of victim through an adult witness if the victim is under age 12). "Outcry" statements are admissible as long as they are restricted to the description of the alleged offense; the exception may not be used to introduce collateral matters or an extraneous offense. *Beckley v. State*, 827 S.W.2d 74 (Tex. App.—Fort Worth 1992, no writ). These statutes often require the trial court to evaluate the timing, content, and circumstances of the statement or to make a finding that the use of the statement in lieu of the child's testimony is necessary to protect the welfare of the child.

Evidence of Victim's Past Sexual Behavior—Fed. R. Evid. 412

Evidence of a child's past sexual behavior generally is inadmissible. The rule specifies narrow exceptions and provides a specific procedure for seeking admission of such evidence. This rule may be implicated in cases in which the child has accused an adult of abuse but may have accused others of abuse in the past. *See United States v. Rouse*, 111 F.3d 561, 569 and n. 7 (8th Cir. 1997).

Expert Testimony in Child Abuse Cases

Rules 702 and 703 of the Federal Rules of Evidence state that expert testimony is permissible if the specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue. *See Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The expert's opinion may be based on otherwise inadmissible evidence if the evidence is of a type reasonably relied upon by experts in the field. The testimony must be relevant and reliable. *See, e.g., U.S. v. Rouse*, 111 F.3d 561, 570-72 (8th Cir. 1997) (evaluating whether district court erred in excluding testimony from defendant's psychological expert that the children had been tainted by improper questioning); *Gier v. Educational Service Unit No. 16*, 845 F. Supp. 1342 (D. Neb. 1994), *aff'd*, 66 F.3d 940 (1st Cir. 1995) (excluding testimony from psychiatrists and psychologists).

In child abuse cases, physicians sometimes testify that a child's condition is "consistent with" abuse. *See, e.g., U.S. v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993); *Ochs v. Martinez*, 789 S.W.2d 949 (Tex. App.—San Antonio 1990, writ denied). The relevance and use of such testimony continues to be a subject of debate. *See* Lyon & Koehler, *The Relevance Ratio: Evaluating the Probative Value of Expert Testimony in Child Sexual Abuse Cases*, 82 CORNELL L. REV. 43 (1996). Expert testimony also is used to rebut the argument that the child's condition/behavior is *inconsistent* with abuse. For example, if the accused argues that abuse did not occur because there is no physical evidence of abuse, testimony that some abused children show no physical signs of abuse will rebut this assumption. *Id.* at 55. A medical doctor may be asked if a child's injuries could have been caused by a non-abusive occurrence. A psychiatrist or psychologist may testify about behavioral reactions to abuse and the long-term impact of the abuse. An expert may give an opinion about the alleged victim's condition, or he may describe symptoms often observed in abused children without giving an opinion about the alleged victim. In some cases, the expert may testify more generally, *e.g.*, he may testify that the child has been diagnosed with a condition that probably was caused by exposure to some sort of trauma.

PROTECTIVE PROCEDURES, INCLUDING VIDEOTAPING AND CLOSED CIRCUIT TELEVISION

Use of Pseudonyms

Children in litigation frequently proceed using "Jane Doe," "John Doe," or the like. The general rule is that parties must identify themselves in their pleadings and that both defendants and the public are entitled to know the identities of a defendant's accusers. *See* Fed. R. Civ. P. 10(a); *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712 (5th Cir. 1979). "Public access to this information is more than a customary procedural formality; First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981) (citation omitted); *see also Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) ("Lawsuits are public events"); *Doe v. Indiana Black Expo Inc.*, 923 F. Supp. 137, 142 (S.D. Ind. 1996) (plaintiff could not use his "privacy interests as a shelter from which he can safely hurl these accusations without subjecting himself to public scrutiny").

Because they are accustomed to complying with state and federal laws that govern the privacy of school children, most school districts seldom challenge a minor plaintiff's request to proceed anonymously. In those few instances in which privacy is challenged, courts will employ a balancing test. For example, in *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981), a plaintiff who challenged the constitutionality of prayer and Bible readings in her child's school was allowed to proceed anonymously because she was able to establish the threat of possible violence against her family. In a more recent case involving a challenge to alleged religious practices, the court permitted the plaintiffs to proceed anonymously, but refused the plaintiffs' request to close the trial to the public, even though a public trial would enable people to learn the plaintiffs' identities. *See Jane Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996).

Videotaping and Closed-circuit Television

The use of videotaping and closed-circuit television continues to result in evidentiary and constitutional challenges. In *Coy v. Iowa*, 108 S.Ct. 2798, 2802-03

(1988), the Supreme Court held that the placement of a screen between the complainant witness and the defendant in a criminal case violates the defendant's Sixth Amendment right to face-to-face confrontation. In *Maryland v. Craig*, 110 S.Ct. 3157, 3165 (1990), however, the Supreme Court left intact a statute allowing the child to testify from another room via one-way closed circuit television. The Court enumerated three findings that must be made by the trial court before such a procedure may be deemed "necessary." These include finding that the procedure is "necessary to protect the welfare of the particular child witness who seeks to testify," that the child witness "would be traumatized, not by the courtroom generally, but by the presence of the defendant," and that "the emotional distress suffered by the child witness in the presence of the defendant is more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" *Id.* at 3169. The *Maryland* factors may be used when the welfare of a child is genuinely at issue. *See, e.g., Gonzalez v. State*, 818 S.W.2d 756 (Tex. Crim. App. 1991) (allowing a child to testify by closed circuit television in a murder case in which the defendant allegedly murdered the child's sister); *U.S. v. Rouse*, 111 F.3d 561, 568 (8th Cir. 1997) (children would have been traumatized had they testified in the presence of defendants).

As of 1994, 37 states allowed videotaped testimony by children and 30 allowed closed circuit television testimony. *See* Marks, *Should We Believe the People Who Believe the Children? The Need for a New Sexual Abuse Tender Years Hearsay Exception*, 32 HARV. J. ON LEGIS. 207, 220 (1995) (citation omitted); *see, e.g.*, Tex. Educ. Code § 21.256(f) (state hearing examiner in a teacher termination case may protect "the privacy of a witness who is a child" by utilizing closed circuit television procedure); Cal. Penal Code § 1346 (West 1994); Mich. Comp. Laws Ann. § 600.2163a (West 1994); N.Y. Crim. Proc. Law § 65.00 (McKinney 1994). States that permit video recordings usually require that an experienced and neutral child abuse investigator conduct the interview, and attendance by attorneys for any party usually is prohibited. In situations involving closed-circuit television, during which the accused and his attorney are in different rooms, the accused must have the ability to talk to his attorney at all times while the attorney is cross-examining the child. This may be accomplished through various electronic devices.

Right of Confrontation in Civil Cases

The Confrontation Clause of the Sixth Amendment applies only in criminal cases, and thus the confrontation rights of criminal defendants and civil defendants are not necessarily co-extensive. *See In the matter of Wolf*, 555 A.2d 722, 727 (N.J. Super A.D. 1989). The Supreme Court has stated that due process is "flexible" and that due process "calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976); *see also Wolff v. McDonnell*, 418 U.S. 539, 567, 94 S.Ct. 2463, 2980 (1974) (right of cross-examination is not "universally applicable to all hearings"; procedures may be shaped by considering the risks of error and the balancing of interests). The Supreme Court has not specifically addressed the use of closed-circuit television in school cases. Some lower courts have indicated that the Due Process Clause of the Fourteenth Amendment may impose obligations similar to the Confrontation Clause, including the right to confront one's accusers. *See Wolf*, 555 A.2d at 727; *Jefferson v. Colo. Dept. of Social Services*, 874 P.2d 408 (Colo. App. 1993, review denied). In *Wolf*, a teacher dismissal case, the court held that it was erroneous to exclude the teacher from the room during the student's testimony. Although the teacher could view and hear the proceedings, he was not able to confer with his attorney during the student's testimony. The court concluded that the teacher was deprived of the valuable right of assisting his counsel with the cross-examination of the teacher's accuser. Although few courts have addressed this question of law as applied in a civil legal proceeding, one may assume that compliance with the criminal law case *Maryland v. Craig* will satisfy due process concerns.

INVESTIGATIVE INTERVIEWING AND COURTROOM EXAMINATION

Investigative Interviewing

Children often confide in trusted teachers and counselors concerning a variety of matters, both large and small. These counselors and teachers need special training on how to receive and respond to disclosures from children and how to report the disclosures to proper officials for investigation. The persons assigned to conduct the actual follow-up investigation will need training on how to ask questions and how to create an environment conducive to accurate disclosure. Training is essential even if the investigator is a parent and presumably has good questioning skills. Investigators need to appreciate that young children may lack the cognitive capacity to record an experience as adults do, and they may lack the vocabulary to describe events that happened to them in the past. Excellent sources for under-

standing these child development issues include: Karen J. Saywitz, *Children in Court: Principles of Child Development for Judicial Application in a Judicial Primer on Child Sexual Abuse* (ABA Center on Children and the Law 1994); *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PACIFIC L.J. 3, 21 (1996); and Walker, *The Handbook on Questioning Children: A Linguistic Perspective* (ABA Center on Children and the Law 1994). Some of the recommendations in this article are based on these materials.

General investigative tips include the following:

If two or more students must be interviewed about the same or similar incident, they should be interviewed separately. This is true regardless of the nature of the investigation: teacher theft, cheating, or child abuse.

If a child is interviewed in the presence of a support person (such as a parent), the parent should be cautioned in advance about the necessary ground rules for the interview, such as not prompting the child. If possible, the parent should be positioned behind the child. Young children may need breaks during the interview.

Particularly in abuse cases, the preferred practice is to minimize the number of interviews that the child victim has to endure; therefore, parents, school officials, and law enforcement officials must coordinate their fact-finding efforts at the earliest possible point. If the child is to be videotaped, all applicable laws must be followed, which may mean that no attorney or law enforcement officer may be present during the interview. Finally, although the number of interviews must be minimized, officials must remember that children often are reluctant to disclose child abuse and that more than one interview may be necessary :

> Research on actual cases, substantiated by means other than child disclosure (e.g., offender confession, venereal disease), indicates that false negatives and resistance to reporting abuse are problems of some magnitude [citation omitted]. For example, taking a sample of 116 high-certainty cases, Sorenson and Snow found that 72 percent of children initially denied sexual abuse, although over several interviews all but 4% disclosed. In addition, 22% of children in Sorenson and Snow's sample recanted during the disclosure process. Lawson and Chaffin examined disclosures of 22 children found positive for sexually transmitted disease. When interviewed by a skilled practitioner, only 43% of these children disclosed....

Faller, *Interviewing Children Who May Have Been Abused: A Historical Perspective and Overview of Controversies*, CHILD MALTREATMENT, Vol. 1, No. 2, p. 89 (May 1996).

Although open-ended questions usually elicit accurate reporting, the information obtained often is incomplete, *i.e.*, there are often "errors of omission," particularly among very young children. Reed, *Findings From Research on Children's Suggestibility and Implications for Conducting Child Interviews*, CHILD MALTREATMENT, Vol. 1, No. 2, p. 107 (May 1996). For example, some young children will answer "nothing" to the question "What happened?" even though the child can show memory of the incident when asked more specific questions about it. *Id.* In one study, children were questioned about a ordinary doctor's exam. When asked whether the doctor put something in their mouths, many child incorrectly said "no." When asked whether the doctor put a thermometer in their mouths, the same children answered "yes." *Psychological Research*, at 37-38.

The interview must attempt to make the child feel as comfortable as possible. Children may be less suggestible when the interviewer is friendly, supportive, and professional. Being kind and understanding or providing encouraging words will not undermine the integrity of the interview. A matter-of-fact tone can be used when delivering empathetic comments such as "I can understand how hard it might be to talk to a stranger/grown-up/etc." Interviewers should not praise children for providing specific content, nor should they criticize or condescend ("I bet you don't remember the color of his hair"). Interviewers must avoid misinterpreting the child's emotional reactions. Dissociation, for example, may be misinterpreted as disinterest. The interviewer also should avoid accusatory statements about the alleged perpetrator; the child witness may still have positive feelings about the perpetrator.

The interviewer should strive to use age-appropriate grammar and vocabulary. The questioner should use short sentences and should check the child's understanding of certain words as needed during the interview. Young children may be unable to give dates or to measure distances or time. Dolls and drawings may be used as appropriate with very young children.

The authors of *Psychological Research* suggest a continuum of questioning:

Open-ended—> Focused—> Specific—> Leading

The interviewer should begin with open-ended questions and then cautiously proceed to more focused questions as necessary. *Id.* at 37 (citation omitted).

"Categorical prompts" might focus children's attention on the forensically relevant categories and increase memory performance. A few "carefully considered" specific questions may be appropriate and ordinarily will not undermine the process. *Id.*

In evaluating the quality of an interview, the court will usually consider the impact of the interview as a whole. In *Carson v. Collins*, 993 F.2d 461 (5th Cir. 1993), the defendant objected that two comments by a social worker were prejudicial. The interviewer asked the girl to tell her "what [Carson] did so we can get something done about it," and she said "it isn't your fault...but he's sick and so we're going to see if we can get him some help because he needs some help." *Id.* at 464 n. 10. The court held that the statements did not violate fundamental fairness. The court observed that the interviewer "did not employ unduly leading" questions and that the two allegedly prejudicial remarks occurred only after the girl disclosed her story of abuse. *Id.* at n. 9, 15.

Courtroom Considerations

In advance of trial, the child should have an opportunity to visit the courtroom or hearing room. The trial/hearing process should be explained in simple terms. The child should be informed what an "objection" is and what the judge or hearing examiner will do.

If possible, questioning of a child should occur at age-appropriate time of day, and the child should be given breaks as necessary. Young children should be entitled to hold a comfort object or to have a support person present (with instructions to the jury as appropriate).

As with investigative interviewing, the questioner must use age-appropriate language and avoid legal jargon. The questioner must recognize that children lack "comprehension monitoring," *i.e.*, they are not skilled at evaluating what they do not know and may mistakenly believe that they understand a question when they do not. Children on the witness stand may feel social pressure to give an answer. Young children are also not proficient at monitoring their communications for error, omission, inconsistency, or contradiction and they may not have the ability to tell a story from beginning to middle to end. *Psychological Research* at 57. The ability to give a coherent chronological narrative begins around 7 to 10 years of age. *Id.*

Questioners must recognize that young children are very literal in their early approach to language. *See generally* Walker, *The Handbook on Questioning Children* (ABA Center on Children and the Law 1994). For example, a child may deny ever visiting the perpetrator's "house" but later may admit visiting his "apartment." A careful and thorough interview during the investigation phase may prevent the occurrence of such "inconsistencies" in the child's testimony at trial.

Even when the child is adverse to the school district, the school district's lawyer should refrain from attacking the child during the child's examination, which may hinder an effective cross-examination and which may offend the fact finder. A careful but low-key examination, during which the child's story naturally unravels, is often a more productive approach.

CONCLUSION

When an investigation involves a child witness, the school lawyer must be sensitive to the child development issues that may affect the ability of the child to provide information. Understanding these issues may result in a better interview of the child and may assist the school lawyer in evaluating the case and in planning a litigation strategy. Similarly, becoming familiar with the rules of evidence may assist the school lawyer in protecting a child witness or in impeaching him, as the case may be.

Case Notes

LIABILITY FOR SEXUAL ABUSE

DeShaney exception to the no duty to protect rule based on state custody does not apply when the student is voluntarily residing in a state facility. The exception based on state created danger does not apply where the state's conduct consists of the failure to act rather than an affirmative act creating the danger or rendering the student more vulnerable to the danger. In addition, school superintendent was entitled to qualified immunity because his failure to act in violation of state regulations did not constitute a violation of any of the student's constitutional rights.

Stevens v. Umsted, No. 96-2071 (7th Cir. December 16, 1997)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=7&navby=case&no=962071

Student was attending school at a state resident facility for the disabled. He was sexually assaulted by other students on several occasions. Even after the school